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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

19 CR 725 (JPO)

5 LEV PARNAS, IGOR FRUMAN, DAVID
6 CORREIA and ANDREY KUKUSHKIN,

7 Defendants.

-----x

8 New York, N.Y.
9 January 30, 2020
10 2:30 p.m.

11 Before:

12 HON. J. PAUL OETKEN,

13 DISTRICT Judge

14 APPEARANCES

15 GEOFFREY S. BERMAN

16 United States Attorney for the
17 Southern District of New York

18 NICOLAS LANDSMAN ROOS

19 REBEKAH ALLEN DONALESKI

20 DOUGLAS SAMUEL ZOLKIND

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GERALD LEFCOURT

FAITH FRIEDMAN

Attorneys for Defendant Kukushkin

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1 (Case called)

2 MR. ZOLKIND: Good afternoon, your Honor.

3 Douglas Zolkind, Nicholas Roos and Rebecca Donaleski,
4 for the government.

5 MR. BONDY: Joseph A. Bondy and Stephanie Schuman, on
6 behalf of Mr. Parnas.

7 MR. BLANCHE: Todd Blanche, on behalf of Mr. Fruman.

8 MS. RAILTON: Anne Railton, on behalf of David
9 Correia.

10 MR. LEFCOURT: Gerald Lefcourt and Faith Friedman, on
11 behalf of Andrey Kukushkin.

12 THE COURT: Good afternoon and welcome, everybody.

13 As you know I scheduled this conference solely to
14 address the issues raised in the connection with Mr. Parnas'
15 request for a third modification of the protective order and
16 the letters that I received about that.

17 I want to start just by confirming that each of the
18 lawyers here has checked with his or her client and that the
19 client has waived his presence.

20 MR. BONDY: Yes, your Honor. We've spoken with
21 Mr. Parnas and he waives his persona appearance.

22 MR. BLANCHE: Yes, your Honor.

23 MS. RAILTON: Yes, your Honor.

24 MR. LEFCOURT: Yes, for Mr. Kukushkin.

25 THE COURT: Thank you.

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1 So I'll the set stage a little bit in terms of
2 background just to make sure we're all on the same page. The
3 request for a third modification of the protective order was
4 filed by Mr. Parnas's counsel on January 17 and I received
5 several letters from the parties in response, all of which I've
6 placed on the docket.

7 To go into the background a little bit more, there is
8 a protective order in this case which was issued in November of
9 last year. It was agreed to by all parties and it was signed
10 by me. The protective order applies to materials that the
11 government designates as, quote, protected materials, end
12 quote. If the government designates materials as protected
13 material then the materials cannot be disclosed publically
14 absent an exception or modification granted about the Court.

15 On December 30⁹ Mr. Parnas's counsel filed a request
16 for permission to produce documents to the House Intelligence
17 Committee in Washington in response to a subpoena from that
18 committee. This was docketed as a modification protective
19 order. It consisted of certain documents and the extraction of
20 Mr. Parnas's iPhone 11. The request represented the government
21 did not oppose this production to the committee and no
22 opposition was filed by any of other party. I granted that
23 request on January 3rd of this year.

24 Then on January 11 Mr. Parnas's counsel filed a
25 request for a second modification of the protective order

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1 seeking permission to produce materials from three other
2 devices of Mr. Parnas. This was also in response to the House
3 subpoena. Counsel for Mr. Parnas represented that there was no
4 opposition from the government and I granted that request on
5 January 13.

6 Finally, January 17, Mr. Parnas's counsel submitted a
7 request for a third modification of the protective order
8 seeking to disclose materials produced by Apple Inc. from
9 Mr. Parnas's iFile account in response to a government search
10 warrant. Again, this was in response to the subpoena issued by
11 the House Intelligence Committee. The government did not
12 consent to this request explaining its position in a letter
13 that was submitted on January 23rd.

14 Mr. Fruman also submitted a letter on January 22 which
15 objected to this third request on grounds of privilege and also
16 raised the issue of privilege with respect to the two earlier
17 requests asking that I order Mr. Parnas to seek to clawback any
18 privilege materials produced to the House Intelligence
19 Committee in response to the subpoena and I received additional
20 letters from the government and counsel for Mr. Kukushkin on
21 these issues.

22 So that's the background. If I got anything wrong,
23 please any of you want to clarify or correct what I said. I
24 want to start with a couple questions for the government.

25 Mr. Zolkind, would you speak for the government?

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1 MR. ZOLKIND: Yes, your Honor.

2 THE COURT: So the first question I have is, were the
3 materials at issue in the first two requests in the
4 government's view covered by the protective order?

5 MR. ZOLKIND: They were, yes. They were covered by
6 the protective order and we did not oppose the defendant's
7 request to modify the protective order to turn those materials
8 over to the House because those were devices that had been in
9 the defendant's possession.

10 THE COURT: So then why were they -- did the
11 government do some action that designated them as protected?

12 MR. ZOLKIND: We did. So we extracted the devices,
13 the extraction involves putting the content of the devices into
14 a report that the FBI prepares and it's turned over and
15 designated as protected because it could implicate privacy
16 interests, third parties' interests, government's ongoing
17 investigation and so we do designated it as protected.

18 But we had discussions with Mr. Bondy and had told him
19 that this was in connection with negotiating the protective
20 order. We had told him that the government was not going to
21 object to him turning over materials to the House in response
22 to the House subpoena to the extent those had been materials in
23 his possession so it was anticipated that there would be
24 proposed modifications to the protective order.

25 THE COURT: So did the government return his actual

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1 phone or did it provide to him some sort of extracted set of
2 materials on a disk or otherwise?

3 MR. ZOLKIND: The latter. We did not turnover the
4 physical device that remains in FBI custody. We turned over to
5 Mr. Bondy an extraction, basically, a report that contains the
6 content that the FBI was able to extract from the device
7 through the course of cracking that device.

8 And I should say we've discussed the fact that
9 Mr. Bondy was presented with the opportunity to provide the
10 password for the device. Obviously, he was under no
11 obligations to do so and declined to do so. So it took the FBI
12 some time to crack that device. My understanding is that even
13 as the FBI has now cracked the iPhone because it was done using
14 their technology and not with the password, that the report
15 that has been turned over is not necessarily the entire content
16 of that phone. My understanding is that there could be
17 additional content on the phone that could be accessed with the
18 password that has not been able to be accessed without the
19 password.

20 But to answer the Court's question what it was turned
21 over was a report that contains the content that the FBI was
22 able to extract from the devices.

23 THE COURT: Has the government returned any of the
24 devices themselves?

25 MR. ZOLKIND: No, your Honor. We are maintaining

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1 custody of those devices. They constitute evidence. There's
2 always, as I alluded to, the possibility that additional
3 material may exist on those devices could be needed for
4 authentication purposes at trial. So it is our standard
5 practice in a case like this not, certainly, to return the
6 device prior to trial and that's the practice we're adhering to
7 here.

8 THE COURT: OK. So I was a little confused because
9 based on the government's different approach to the third
10 request in which the government said, well, he can get on Apple
11 Support and get his own iCloud. I thought the government was
12 going to say the first two were not even subject to the
13 protective order because that's material that Mr. Parnas had
14 before, he could have turned it over to the House Committee
15 before his arrest. It wasn't really a Rule 16 discovery but
16 your position is that it was.

17 MR. ZOLKIND: Our position is that it was, your Honor.
18 And I should say I'm not sure if this short circuits the issue
19 in any way but Mr. Bondy told us just a few moments ago that he
20 has since writing these letters, has since been able to
21 download his client's iCloud account from Apple the way that
22 the government had proposed that he do. And so our
23 understanding is that he is now withdrawing his request to
24 turnover the iCloud account to Congress. He'll correct me if
25 I'm misunderstanding but that is my understanding. So I'm not

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1 sure that this remains an issue as to whether or not the
2 government's objecting or not objecting.

3 THE COURT: OK. Well, before I get to that I want to
4 get the government's position on whether the materials that he
5 downloads from Apple are within the protective order.

6 MR. ZOLKIND: No. If he, separate and apart from the
7 criminal case pending here, goes onto his Apple account,
8 downloads materials that he can access on his own without some
9 process from the government, no, those wouldn't be subject tot
10 he protective order.

11 THE COURT: OK. Thank you. That's helpful.

12 I guess it's probably most efficient for me to turn to
13 Mr. Bondy and ask whether there's a live dispute as between you
14 and the government.

15 MR. BONDY: They beat me to it, your Honor. I had
16 apprized all the parties earlier today and the Court that we
17 will withdraw our request for the subpoena and the warranted
18 materials from the cloud account. And the reason being that
19 the younger people in my office have identified, indeed, we can
20 do this and we don't need to have the kind of data that the
21 government has indicated that they have some propriety ability
22 to obtain from Apple.

23 I know that in their letter they've indicated that
24 they would assist us if there are any records that we cannot
25 kind of reconstruct the deleted records. But I think that that

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1 would narrow the issue. I think that it would also raises this
2 question, I'd say everything that we've really turned over,
3 limited exception so far, is stuff that could have been derived
4 from the cloud. And the problem has been with Mr. Parnas we
5 did not want to do any damage, whatsoever, to the evidence that
6 the government possessed in the beginning stages of this case.
7 The last thing we wanted to do was have him do some kind of
8 process involving a two-step verification that would have had
9 them lose access to data that I understood that in the early
10 part they had yet to extract.

11 So for our purposes today and to narrow the issue, I
12 think we're really talking about Mr. Blanche's concerns about
13 attorney/client privilege.

14 THE COURT: OK. Understood.

15 MR. BONDY: Thank you.

16 THE COURT: Let me go back to the government for a
17 second.

18 Do you have any position on the dispute that I might
19 ask Mr. Blanche about privilege?

20 MR. ZOLKIND: Your Honor, we are not taking a position
21 as to clawback requests or other requests that Mr. Parnas's
22 co-defendants have made.

23 I will just state so that the Court is clear, at the
24 time that we informed Mr. Bondy that we were not objecting to
25 him turning over the iPhone or other devices in response to the

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1 House subpoena, we made very clear to him that what he had in
2 his possession he had received from the government were
3 materials that had not made their way out of the filter
4 process. So in other words, had not been reviewed for
5 privilege that might well contain privilege materials. So at
6 the time that we told him we weren't opposing the request, we
7 made sure he was aware of that.

8 THE COURT: If the House Intelligence Committee let's
9 say had subpoenaed the United States Attorney's Office for the
10 Southern District of New York, just as it had subpoenaed
11 Mr. Fruman and Mr. Parnas in October, would the government have
12 A, complied, and B, filtered for privilege first?

13 MR. ZOLKIND: I honestly do not know the process that
14 would have taken place. What I can say is that there is an
15 office within the Department of Justice, the Office of
16 Legislative Affairs or OLA, which has control over all
17 communications and requests between the Congress of the United
18 States and the Department of Justice. So that is a question
19 that to the extent that they would receive a requests or
20 subpoena from Congress, that office would at least in the first
21 instance determine how the department responds to that. So
22 that hasn't happened here at least that I'm aware of and so I
23 don't know how that would have been handled.

24 THE COURT: OK. Thank you.

25 Mr. Blanche, given where we are, is there still a live

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1 issue from your perspective?

2 MR. BLANCHE: Yes, your Honor. I still think the
3 privilege issue is live because I have no idea what has been
4 produced to the House as part of your Honor's prior two rulings
5 regarding the protective order. I do know with confidence that
6 there are materials on the phone. I don't know what -- but
7 there are materials on the phones that he asked permission to
8 produce that contain privileged information that belonged to
9 Mr. Fruman. They also belonged to Mr. Parnas. But I still
10 have exactly the same concerns that I had coming in here. I
11 will deal with the fact that potentially Mr. Parnas is going to
12 produce materials off of his iCloud to the house that may
13 contain privileged information as it relates to Mr. Fruman
14 separately from Mr. Parnas.

15 I am not sure that your Honor has anything for your
16 Honor with respect to those materials --

17 THE COURT: So you recognize that the iCloud matters
18 that he downloads himself are not within the protective order.

19 MR. BLANCHE: I agree with that.

20 THE COURT: But there's a technical difference but not
21 really a practical difference between -- everything from
22 Requests One and Two were materials he had before. He could
23 have turned them over before the arrests in this case. And if
24 you had that remedy, if your client had that remedy, it would
25 be in Washington presumably with the motion to quash the

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1 subpoena or to treat confidential jointly held privileged
2 materials to the House Intelligence Committee or in the
3 District Court of D.C. But how is it different? How are the
4 first two tranches different from the iCloud account?

5 MR. BLANCHE: Mr. Bondy and Mr. Parnas would not, they
6 didn't have that information from the first two productions
7 except for from discovery in this case. I don't disagree with
8 your Honor that had they made the production prior to the
9 arrests, sure, they could have done that or if the government
10 ultimately returns the phone at the conclusion of this case
11 they could turn them over and then they wouldn't be subject to
12 the protective order. But the materials were -- and I do
13 believe that, your Honor, given that when I think about it, if
14 Mr. Bondy would have said in his initial request to your Honor
15 that he is going to produce materials that contain privileged
16 information that belonged to, among other people, Mr. Fruman,
17 I'm assuming your Honor would have questions. I would have
18 certainly objected. It would have raised a lot of issues that
19 were not raised by his letter which indicated, that would imply
20 the material would be reviewed before being produced and there
21 would possibly be a subset produced.

22 THE COURT: We haven't decided.

23 MR. BLANCHE: Hadn't decided, correct, exactly.

24 So the fact that your Honor did give permission to
25 produce an entire phone, among other things, that contained

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1 privileged materials, I do think your Honor has the power to
2 direct Mr. Bondy to attempt to clawback any privileged
3 materials that belonged to Mr. Fruman.

4 The side issue here is that -- well, maybe not the
5 side issue but another issue here is the idea that the House
6 does not respect attorney/client privilege or does not allow
7 parties responding to subpoenas to do a privilege log and only
8 produce non-privileged materials is absurd. There's lots of
9 examples. Even in the investigation of, the impeachment
10 investigation where the House allowed people, individuals
11 responding to subpoenas to not produce privilege materials,
12 indeed, the original request to Mr. Parnas had a carve out
13 within it -- it's an attachment to Mr. Bondy's letter -- that
14 allowed Mr. Parnas to not produce privileged materials and to
15 create a privilege log.

16 So the idea that there would have been no remedy for
17 Mr. Fruman because the House doesn't recognize the
18 attorney/client privilege is just not true. The House had an
19 agreement with Mr. Bondy with respect to the certain privilege
20 materials as it is.

21 I do think that your Honor does have the authority to
22 say those materials were produced pursuant to the protective
23 order and -- in this case and that Mr. Bondy should attempt to
24 clawback privilege materials. There are privilege materials
25 that are highly relevant to this case that I believe have been

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1 produced.

2 THE COURT: Give me an example.

3 MR. BLANCHE: There was a prior investigation by the
4 FEC -- conduct and charged indictment, Fruman and Mr. Parnas
5 hired counsel, as did Mr. Gray and there are communications.

6 THE COURT: Was that Mr. Dowd or was --

7 MR. BLANCHE: No. Totally separate law firm. The
8 relationships referenced in Mr. Bondy letter, I don't know if
9 there's a single privileged document addressing that. But
10 there is definitely privileged documents --

11 THE COURT: Do you agree that that's privileged?

12 MR. ZOLKIND: I certainly agree, your Honor, that
13 there could be, well, certainly, could be communications
14 between Mr. Parnas, Mr. Fruman and/or Mr. Correia and the
15 lawyer that they were consulting in connection with the FEC
16 investigations. So, yes. Obviously, to the extent that those
17 materials exist, we haven't seen them. But my understanding
18 from the filter team is that it's certainly possible those
19 materials would exist.

20 THE COURT: Would an exception apply?

21 MR. ZOLKIND: That's something -- whether a particular
22 document came within a crime fraud exception would be something
23 we'd have to analyze. Certainly, we're not taking the position
24 right now that there's a crime fraud exception that applies.
25 Not to say that that couldn't arise at some point but we're not

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1 taking that position today.

2 THE COURT: If someone had seen it it would be that
3 filter team, not the three assistant U.S. attorneys sitting
4 here.

5 MR. ZOLKIND: Correct. Our filter team is reviewing
6 all of this material for privileged documents and removing them
7 before they make their way --

8 THE COURT: Got you. Sorry to interrupt.

9 Do you want to add something?

10 MR. LEFCOURT: Yes, your Honor. With respect to Count
11 Four of the indictment, conspiracy to have licenses which is
12 the only count Mr. Kukushkin is charged in, there was a
13 business being formed to obtain licenses for the legal
14 distribution of marijuana and they consulted counsel. And all
15 of the defendants were part of those discussions. So there is
16 privileged material definitely with respect to the transaction
17 concerning Count Four.

18 THE COURT: OK. So those are some examples.

19 MR. BLANCHE: My point is that, the point of the
20 letters and my objection was not to raise some hypothetical law
21 school question. It's that I have multiple documents that are
22 highly privileged that belong to three of the defendants and in
23 some cases four of the defendants that are not -- some of them
24 are about not necessarily directed to the conduct charged in
25 the indictment but still communications among counsel including

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1 Mr. Fruman and Mr. Parnas. Mr. Parnas and Mr. Bondy may have
2 made a decision to waive that for whatever reason or motivation
3 they have. But the point is it certainly didn't ask Mr. Fruman
4 or me whether we waived it. He most certainly did not. I
5 believe Mr. Correia does not waive it and certainly
6 Mr. Kukushkin doesn't waive.

7 So putting aside the crime fraud, that's a decision to
8 be made much later. But before your Honor is a simple request
9 whether Mr. Bondy should be instructed to try and get back
10 those privileged materials.

11 THE COURT: Is that a reasonable remedy? Is there
12 really -- if I ordered him to go back to the House Intelligence
13 Committee and get back the materials, what do you expect is
14 actually going to happen?

15 MR. BLANCHE: This happens in litigation all the time.
16 It happens at the house all the time. There is litigation that
17 you can find in Washington D.C. where there's been materials
18 produced and inadvertently produced or produced later. You
19 learn there's privilege and you say listen, based on 789 were
20 privileged, can you return them? I don't know what the house
21 will do. But I assume I don't think it's farfetched that when
22 Mr. Bondy says to them, listen, the following Bates numbers
23 I've produced to you contain privileged information, will you
24 lease return them? I don't doubt the House is going to go to
25 court or say no, no. We really want to keep them. I believe

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1 Mr. Bondy's communications about doing a clawback of some the
2 of materials, I don't think they said no.

3 THE COURT: Well, he gave a lot of stuff. We're
4 talking extraction of a lot of devices, tons of stuff. I don't
5 know. It's certainly not reasonable to expect the House to go
6 through it with their staffing. I don't know that Mr. Bondy
7 needs to go through it and give them a bunch of Bates numbers
8 and pages because there is no calling up Bates numbers on these
9 documents.

10 But in any event, there are two issues from the
11 clients perspective which is one is, has he inadvertently
12 waived privilege? And I don't think anyone here could be
13 regarded as having waived privilege even though you could have
14 raised this when his first letters came in and he didn't until
15 the third request. I don't think the other defendants have
16 waived privilege. But in terms having it out there, I don't
17 know that anything is going to happen to it that's going to
18 affect your client or other defendants given where we are.

19 MR. BLANCHE: Just going back to the waiver issue a
20 moment, I do think that it's important that we're doing the
21 exercise that we're doing here today in expressing the fact
22 that we did not waive and we don't agree to it. So I agree
23 with your Honor that we haven't waived.

24 And the reason why we didn't, why Mr. Fruman did not
25 file an objection to the first two requests is twofold. One is

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1 operating under the assumption that counsel did not provide
2 privileged material to the House or privilege that did not
3 belong to him. I found out from the government shortly before
4 the third requests to maybe right after the third requests that
5 their taint team had in fact identified potentially privileged
6 material they hadn't seen them. The filter team hadn't seen
7 them.

8 I immediately wrote a letter to your Honor and
9 communicated with Mr. Bondy where counsel for Mr. Correia
10 asking whether it was true that he had not done any kind of
11 review. We were told he not done a review and we were told
12 that he didn't intend to do a review. So I don't think
13 Mr. Fruman should be faulted for not jumping up and down the
14 first two times. I'm not going to operate under the assumption
15 that folks are going to just violate the attorney/client
16 privilege. I wouldn't expect that to happen. So I learned
17 that that may be happening, Mr. Fruman did immediately exercise
18 his rights as I believed did the other defendants.

19 So I don't share your Honor's view in trying to
20 attempt to clawback some of the other materials is fruitless.
21 I don't think the House -- it does matter in the long run. The
22 House has released to the public certain materials produced by
23 Mr. Parnas. So there may come a day when everything is
24 released. Who knows? And so if certain privileged materials
25 have been clawed back it matters because they'll never been be

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1 in the public and we will be able to maintain -- the cat will
2 be out of the bag and we can't put it back. I do think it
3 matters.

4 THE COURT: OK. I'd like to give Mr. Bondy an
5 opportunity to respond.

6 MR. BONDY: Thank you very much, your Honor.

7 A few things. As the Court noted, we made this
8 request for the iPhone 11 the 30th of December. There was no
9 communication from Mr. Blanche, whatsoever, about what we
10 intended to handover. Our letter indicated that to the extent
11 we take out a subset of material that we would apprise the
12 parties of that fact, we did not. There are other privileges
13 that are at issue, whether they are spousal materials we
14 materials that were seized from Parnas' home. The filter team
15 identified certain materials like what Mr. Parnas was eating
16 for breakfast, when they were feeding the baby and we decided
17 not to exercise the privilege over those materials to invoke
18 any kind of privilege.

19 But we at all times have tried to behave appropriately
20 in this case and get very voluminous materials to the House
21 Intelligence Committee on a very, very short deadline so that
22 they could be utilized meaningfully in the impeachment inquiry.
23 When I first raised the issue of attorney/client privilege with
24 Dan Goldman from the House Intelligence Committee, he correctly
25 retorted, We don't recognize the common law judicially free in

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1 privileged attorney/client privilege.

2 THE COURT: Why is subpoena according to Mr. Blanche
3 has some acknowledgment of privilege treatment material?

4 MR. BONDY: The devil is in the details. That's the
5 September 30 letter request when this was being requested and
6 Mr. Fruman, of course, decided not to honor the request at that
7 time Mr. Parnas being represented by the same lawyer that was
8 representing Mr. Fruman, John Dowd and of course, we've shown
9 the Court a communication that Mr. Dowd and Mr. Seculow and
10 Jane Raskin and Rudy Giuliani. But Mr. Dowd in his famous
11 comic sense letter took the position that there would be no
12 compliance with that letter request.

13 If Mr. Blanche -- and I would invite the Court's
14 attention to the subpoena -- that was then tendered as Exhibit
15 C, the subpoena doesn't have any such carve out or privilege
16 log, whatsoever. And having done the research, what I find is
17 this. It is a judicially created privilege. It may be in
18 Upjohn and supreme court time honored and I accept that
19 privilege in a judicial proceeding.

20 I look at, for example, Mr. Blanche wants to cite the
21 Rules of Evidence. He cites Rule 1101(C) but as I was reading
22 Rule 1101 of the Federal Rules of Evidence the applicability of
23 the rules don't apply to congressional inquiry which is deemed
24 to be a non-adversarial or at least less adversarial
25 proceeding. We've examined that the Rules of Evidence don't

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1 apply in this court to like a sentencing proceeding or
2 obtaining a warrant. But in any event, as I was reading the
3 applicability of these rule and I would include as privilege,
4 they don't apply to a congressional inquiry.

5 So what we tried to do is get all of this evidence
6 quickly to the House so that Mr. Parnas would be viewed as in
7 compliance with his subpoena or we could try to undue the
8 damage that had been created by his prior lawyer refusing to
9 comply with the requests for documents. In the original
10 requests Mr. Parnas was supposed to give over documents and
11 also testimony. By the time that we indicated that we would be
12 complying with the subpoena and I had Mr. Blanche in my office
13 on November 5th when we told them that he would be complying
14 with the subpoena that of course at that point all of our paths
15 diverged because Mr. Fruman remains in noncompliance and has
16 continued to decide he doesn't want to provide any materials,
17 even those subpoenas erred from them.

18 But at that moment in time he had no longer had any
19 commonality of interests and it would be pretty safe, not a big
20 inferential leap to know that when we're producing materials
21 pursuant to these modifications that were requesting of the
22 Court and that the government is agreeing to or at least this
23 time they proposed it but it's no longer right, that there
24 would be materials on, for example, the iPhone 11 that would
25 involve Mr. Fruman.

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1 In fact, Mr. Blanche received probably the analog of
2 his client's materials that would have many of the things if
3 not almost all of the things that we're discussing on
4 Mr. Fruman's phone.

5 THE COURT: Well, he suggested you lulled him into
6 inaction by suggesting in your letter that you'd be
7 reviewing --

8 MR. BONDY: Well, I didn't lull him into inaction and
9 that's not what I said in the letter. I said we would identify
10 to the extent that we had taken anything out, we would identify
11 that.

12 The government did in their letters indicate to us
13 that we would be potentially waiving privilege with respect to
14 the things we turned over. As the Court's probably well aware,
15 we approached this case a little differently than people often
16 approach cases and we've waived our own privilege with respect
17 to a lot of materials. The singular piece of privilege we
18 retained is the communications and the attorney work upon
19 evidence that was generated by either Ed McMahon and
20 Mr. Parnas, my predecessor counsel or I, subsequent to the date
21 of Mr. Parnas's arrest. Everything else we've given over. We
22 are not asserting any kind of privilege. But I think that the
23 remedy is simple. I've asked the government if they would
24 agree to this and told me they're thinking about is to just
25 maintain the filter team in place, to have everybody agree that

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1 none of those materials are going to be used in this judicial
2 form with privileged attached and for us to be able to go on
3 from there.

4 THE COURT: You can understand though, imagine you
5 were treating the case as an ordinary case where you are going
6 to assert all the privileges and your client had a business
7 relationship with another client and they had a joint
8 privilege. Wouldn't you be upset if the other client was
9 turning stuff over to a congressional committee without you
10 concern for your client's privilege?

11 MR. BONDY: I would be upset. I would also be upset
12 if I had decided or our client had decided to be in contempt of
13 his subpoena and the other party wanted to abide his subpoena.
14 But I would understand if we had a diversion path at that point
15 which would involve all of our efforts to produce materials
16 pursuant to the subpoena so that they're not in contempt of
17 Congress. And the notion that Mr. Parnas will have to either
18 oppose production of these materials and risk being in contempt
19 or somehow go through the -- so we can identify items that are
20 not even recognized as privileged by the congressional body.
21 We didn't do that. And I apologize if I offended Mr. Blanche
22 certainly, but I don't think we did anything inappropriate.

23 THE COURT: Is there some sort of clawback of the
24 request of your contact of the House Committee in the nature of
25 just don't publish anything, don't make anything public without

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1 checking with me for --

2 MR. BONDY: Yes good question. I spoke to the
3 committee. They're a little busy but we communicated by e-mail
4 day before yesterday I think it was. And they have no issue, I
5 believe, with the clawback of a Samsung telephone that was
6 produced to us under the protective order and the modifications
7 allowed us to give it over to IPSE that really didn't belong to
8 Mr. Parnas we found. It belonged to Mr. Fruman's minor child.
9 And somehow it was misdescribed as being ours. I note in the
10 public record, the things that have been put into evidence at
11 the proceeding do not involve privilege material as to
12 Mr. Fruman. And in fact IPSE has been very, very narrow in
13 terms of the production of materials into the record from what
14 we produced that's maybe a thousand of the percent.

15 The greater discussion that it will have, I am going
16 to have it is whether we can enter into some agreement that
17 those things will not be produced or disseminated or put into
18 the public record somehow. But I don't think that a clawback
19 is that realistic quite frankly in the form of there are no
20 Bates numbers. That file is 50 gigabytes maybe, that iCloud 11
21 file is voluminous. But I will do my best to preserve and
22 protect Mr. Fruman's documents from reaching public view

23 THE COURT: OK. I think the law is a little bit murky
24 in this area. I've seen authorities from House legal sources
25 that congressional committees do take the view sometimes that

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1 were kind of above privilege common law privilege. I don't
2 think it's something that's been tested in courts. I think
3 that is a situation where there's a subpoena from a
4 congressional committee and then a protective order and I don't
5 know that there's clear law, one trumping the other, certainly,
6 not in this type of context. I recognize your point that
7 impeachment is a particularly significant action and there
8 might be time issues that required production from your
9 perspective particular time.

10 So I think it's kind of a difficult issue. I thought
11 I was going to have an easy way out by saying the government's
12 returning our phones but it's not subject to the protective
13 order. Turns out they did designate it as protected material
14 and the therefore, technically, it is. So I think it's tricky.

15 Mr. Blanche.

16 MR. BLANCHE: Briefly, I agree with your Honor. It's
17 quite unsettled. And the reason in my experience is the House
18 and the Senate never require attorney/client privileged
19 information to be produced. There's a few cases out there but
20 not cases where the House has said Dan Goldman didn't say to
21 Mr. Bondy, no, no, I want your privilege stuff. To the
22 contrary. He immediately reached an agreement with Mr. Bondy
23 about privileged materials.

24 So the idea that the house the house would not have
25 honored a request to produce a privilege log or did not produce

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1 privilege materials is wrong and absurd. Indeed, Mr. Bondy got
2 an exception to not produce privileged material as related to
3 his relationship with Mr. Parnas. So that's not fair for that
4 position to go any where.

5 Secondly, both letters requesting exemptions to the
6 first two did not indicate that Mr. Bondy would share anything
7 with the parties. He said that he would report to the Court
8 and the government the subset that was produced. So this theme
9 or this idea that somehow Mr. Fruman just sat idly by watching
10 as his privileged rights went out the window is just absolutely
11 false. I certainly operate under the assumption that Mr. Bondy
12 was not going to produce certain materials that belonged to my
13 client. The day that I learned he may have, the next morning I
14 wrote a letter to your Honor. So I don't think there's been
15 any issue with waiver or me standing by while Mr. Bondy did
16 this.

17 I will tell that you, I am confident that a
18 communication with Mr. Goldman at the time that would have said
19 there's privilege material that belongs to other people beyond
20 my client, I don't want to have to produce those or I want
21 those. I want to have the opportunity to claw those back. I
22 would be shocked if the answer wouldn't have been absolutely.

23 Finally, Mr. Fruman is not in contempt of Congress.
24 He was indicted and he has Fifth Amendment rights. It is
25 Congress, the House has no expectation. It had no expectation

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1 that he would comply with the subpoena after he was indicted.
2 I don't know how, what communications Mr. Parnas has had with
3 the House through counsel but there's no been no overtures to
4 me or to my client that he is in any kind of contempt of
5 congress. He was indicted and there's been expectation that he
6 would supply documents or appear to testify given the case in
7 this court.

8 So the clawback issue, I don't know what to say. The
9 answer seems to be it seems like it's going to be a lot of
10 work, the clawback materials that were privileged. Yes, it
11 probably is a lot of work. You can do searches. There's a law
12 firm that his client knows about that you can do a search of
13 anything with that law firm's name on it. I did the searches.
14 It took, it helped but I did the searches and there were, it
15 doesn't take a super long time to identify the materials we're
16 talking about

17 THE COURT: I am still skeptical about the -- idea of
18 a claw back because you didn't ask for anything at the time of
19 the first two tranches and you could have. You could have, to
20 me or the House Committee. And B, the House really doesn't
21 take the position. There's no privilege, especially with
22 respect to the impeachment. I don't know that was it wrong to
23 turn everything over. I think it's unfortunate for your client
24 but why isn't there any remedy that you have for you to go to
25 the House Committee?

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1 MR. BLANCHE: They didn't take that position. They
2 agree as it relates to Mr. Bondy. So that's not accurate. I
3 haven't tried to go to the House. I didn't make the
4 production. That's certainly something I could try to do. I
5 don't know what was produced. I haven't been given a copy of
6 what was produced. That's the other issue that if the Court is
7 suggesting that Mr. Fruman should do something to right the
8 wrongs done by Mr. Parnas, OK. But then I need to get a copy
9 of the materials that were produced. I can draft a privilege
10 log. I can do the work, identify all the documents that all
11 the defendants at this table have to a joint privilege, try to
12 claw them back from the House. It seems extremely unfair
13 that's the remedy proposed by Court. But if that's what we
14 have to do to protect information, I don't believe that any of
15 the other co-defendants would take a different view than I do
16 about this material. But it would seem like an unfair remedy
17 for Mr. Fruman to have to spend the time and expense
18 identifying privileged documents produced by Mr. Parnas in
19 order to attempt to claw them back from the House.

20 THE COURT: Well, the documents are sitting in the
21 House. A tiny percent has been made public and they take the
22 position that -- if I say that it wasn't a waiver I think it's
23 very unlikely -- waiver on the behalf of the other clients. I
24 think that prevents you from being prejudiced unless something
25 else happens. I don't know.

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1 MR. ZOLKIND: Your Honor, just in terms of the effect
2 of the disclosure of some of these documents to the public,
3 although, they're being deemed not to be a waiver, certainly,
4 the government is not going to, I can't imagine that we would
5 use a document that our filter team determines to be privileged
6 even though that document was disclosed to the House. But that
7 doesn't entirely answer the question of what happens if a
8 potential witness who we may not have even identified yet today
9 reads that document in the media. So we can certainly take
10 reasonable steps to avoid using material that could have been
11 privilege that were turned over to the House but I just want to
12 flag the fact that there would still be the possibility of some
13 derivative exposure to those documents.

14 THE COURT: What do you think is a reasonable solution
15 here?

16 MR. ZOLKIND: Again, the government's not taking a
17 position on the clawback question but I do think Mr. Blanche
18 raises a reasonable host, even though the documents are not
19 Bates stamped. So as I understand it it would be difficult to
20 say documents one, two, three, four, five. But to the extent
21 that there's particular lawyers that were involved in these
22 communications it might not be a terribly big lift to either
23 identify those lawyers to the House and say communications
24 involve those lawyers are very likely to be privileged or for
25 Mr. Parnas or Mr. Fruman or one of the other defendants to

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1 review the materials and identify the specific communications
2 involving those lawyers.

3 We'll say, again, we haven't seen, we sitting at this
4 table haven't seen potentially privileged communications but
5 from how they're being described and from our understanding,
6 what we heard from our filter team, it doesn't sound like they
7 would fall within the subject matter that would be particularly
8 interesting to the House. They might well be a relevance to
9 this case but from what we understand about what the House is
10 looking at, it's not obvious that they would be material that
11 the House would be concerned about.

12 THE COURT: Right. That's why I assume they are never
13 going to see the light of day.

14 MR. ZOLKIND: Right. And to the extent that they
15 exist at the House but are never released to the public, the
16 derivative taint issue that I was describing, I think is not a
17 real concern. The concern would be just with respect to the
18 materials that get released to the public that potential
19 witnesses could view.

20 THE COURT: Why is the government raising this now
21 when you had no trouble with the first requests saying, sure,
22 no problem, even though you thought it was Rule 16 discovery
23 you designated it as protected, you promptly said fine, turn it
24 all over?

25 MR. ZOLKIND: Our objection here is based on the fact

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1 that the materials that Mr. Bondy was proposing to turnover
2 came from Apple.

3 THE COURT: I'm not talking about that. I'm talking
4 about why you're now saying where we think there's all these
5 third-party attorney/client privilege concern you didn't raise
6 that before.

7 MR. ZOLKIND: We did. As I said, at the time that we
8 told Mr. Bondy that we were not objecting to him turning this
9 material over to the House, we did tell him that this material
10 that you have in your possession now is stuff that has not yet
11 gone through the privilege review and so we did flag that for
12 him. Then once we saw that it had all been turned over
13 wholesale to the House without a privilege review, without
14 anything being talked and out and we saw the materials being
15 released to the public, we made sure when the most recent
16 requests came, made sure to flag it to the other defense
17 counsel so that to the extent that they weren't already aware
18 of that, they knew that this was the situation.

19 THE COURT: So you think that Mr. Blanche has a good
20 point at the end of the day about with respect to the clawback
21 argument?

22 MR. ZOLKIND: Yeah. I think it doesn't strike me as,
23 again, I haven't, I don't know the exact process they'll have
24 to go through to identify the materials but doing privilege
25 reviews, identifying specific lawyers, specific law firms, I

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1 wouldn't think that that would be a huge task either for one of
2 defendants or for the House to do to identify communications
3 that involved one of those lawyers at a minimum.

4 THE COURT: OK. Thank you.

5 Mr. Bondy, did you want to say something?

6 MR. BONDY: Yes, just a couple things.

7 Our agreement was entered into with the House when we
8 traveled to Washington to deliver these files that day. And it
9 only governs, it doesn't protect Mr. Parnas in any respect
10 except as to those communications that he had between either
11 Edward McMahon or I from the date of his arrest which was
12 October 9, I believe, forward.

13 THE COURT: But that belies the argument that
14 Mr. Bowman and the House don't care about privilege or above
15 privilege.

16 MR. BONDY: It was all I felt I could fairly get quite
17 frankly, I felt that given the fact that they had a subpoena
18 that they had served on Mr. Parnas dated October 10, I believe
19 Mr. Fruman got the same subpoena, the same legal command on
20 October 10 that he has not in been compliant with, that was
21 what we believed we could fairly extract.

22 I have asked the House. But as I said, they are a
23 little bit busy. I don't know how easy it would be for them to
24 return these materials. I note that there has been very
25 scrupulous, very narrow production as to Mr. Parnas. I think

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1 that the easy remedy is one and I'd asked the government
2 yesterday and they said they're thinking about it. I think the
3 easy remedy is for the Court to just order or otherwise have an
4 agreement that any materials that have been produced to a
5 congressional body pursuant to Parnas, the clear terms of his
6 subpoena are not going to be utilized in this form and indeed,
7 that these defendants have not waived privilege here with
8 respect to my production in the impeachment.

9 THE COURT: That seems fine but it seems like you are
10 not responding to Mr. Zolkind's point about the derivative
11 effect with jurors or whatever where they might see something
12 and it was privileged and belongs to Mr. Fruman say.

13 MR. BONDY: I think I can circle back to the Court. I
14 don't think it's unreasonable for me to ask if in light of --
15 and they're aware of the fact that we're having a hearing
16 today. They're aware of the issues at stake here -- to ask if
17 there's a way for us to somehow protect those materials
18 unscrupulously so from any other kind of public disclosures.
19 Of course everyone is worried whether it's here or in
20 Washington about the potentiality or a leak of some materials.
21 I stand that. But there is possibly a way for it to be
22 sequestered in the house where they retain custody over those
23 exhibits and I am happy to ask.

24 THE COURT: Let me just ask whether Mr. Lefcourt or
25 Ms. Friedman or Ms. Railton wants to add anything to what's

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1 been discussed.

2 MR. LEFCOURT: No, your Honor.

3 MS. RAILTON: We appreciate your Honor's position that
4 the defendant is not -- we did not intend to waive privilege
5 and we're happy with it, whatever is done to protect
6 Mr. Fruman's privilege we've done protect that --

7 THE COURT: Thank you.

8 Mr. Blanche, let me just be clear that with respect to
9 the iCloud, the things that Mr. Parnas downloaded himself,
10 you're not asking for any remedy from me with respect to that?

11 MR. BLANCHE: I would like to but I don't think I have
12 the ability. I think there's other remedies I will have with
13 ethics and whatnot because I don't think Mr. Bondy is permitted
14 under his rules of attorney to produce privileged materials
15 that belong to somebody else. But it's not something that I am
16 asking your Honor to try to remedy today.

17 THE COURT: OK.

18 MR. BONDY: I have read the rules Mr. Blanche has
19 cited and I think that I haven't revealed knowingly a
20 communication to the disadvantage of my client or the advantage
21 of a lawyer or a third person. I do believe the
22 attorney/client privilege does not -- and as the Court has
23 noted -- apply in this congressional inquiry. That is what the
24 case is saying. That's what the law is.

25 I also note as I looked at the rule, it cites a couple

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1 of additional rules and this is not about a duty to afford a
2 client or a duty to a prospective client.

3 In terms of secondary rule about conflicts of
4 interest, and up until I got my letter from Mr. Blanche on the
5 27th of January, I thought he was really just representing the
6 interests of Mr. Fruman's court. But I note the footnote and
7 it's at page three of this letter, Footnote Five, where he
8 feels for some reason a need to identify Dimitry Freetash and
9 the potentialities of some materials that Mr. Parnas has turned
10 over somehow had breached his attorney/client privilege.

11 I also note and Mr. Blanche and Mr. Giuliani
12 apparently have some kind of a joint defense as reported in The
13 New York Times and have had that for a couple of months. And
14 if we connect the dots, I have asked the Attorney General to
15 recuse himself and a lot of that has to do with bona fide
16 perceptions based on the public documents of the existence of
17 at least the appearance of impropriety of a conflict of
18 interest. So I will abide by whatever order the Court issues.

19 I certainly can ask for there to be the return of a
20 sequestration of those documents. I don't believe I've
21 breached any rule of ethics. And furthermore, I note that
22 Mr. Blanche cited CPLR 4503(A) in connection with something
23 I've done wrong. And as I read that rule it pertains to
24 administrative actions, trial and hearings, proceedings,
25 conducted on be behalf of any state, municipal or local

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1 government agency or legislature or committee or body thereof.

2 Again, I think that these citations are inapposite.

3 The legal citations I have cases have never been cited out of
4 the D.C. circuit, I believe. In any event would seem to
5 support my premise. So I leave it to the Court, your Honor.
6 I'll do what ever it is the Court wants.

7 Thank you.

8 THE COURT: Do you want to raise anything? You don't
9 have to. That is not something that's pending before me as I
10 understand it.

11 MR. ZOLKIND: That's not a subject I was going to
12 address. I stood up because Mr. Bondy referenced that the
13 Court could just enter an order saying that there's no waiver
14 with respect to the materials turned over to the House and I
15 just want to make sure, I don't think an order like that is
16 necessary. But if the Court were inclined to enter an order
17 like that, I think it should be clear that if the Court is not
18 saying it's not a waiver as to Mr. Parnas because I think
19 clearly, Mr. Bondy has already said, that his client is waiving
20 any materials turned over.

21 THE COURT: Understood. Fair point. I'm not going to
22 issue an order today on that. But I think it was fair to
23 indicate to counsel for the three defendants other than
24 Mr. Parnas that from what I've seen, I think it's extremely
25 unlikely that there's been a waiver. I don't think there was

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1 an intended waiver, certainly. So I'm not going to officially
2 make an order on that right now. So if other facts come to
3 light, who knows? Certainly, very, very, unlikely from what I
4 know to find that there's been a waiver.

5 I think this is all sort of a gray area because I
6 think there was a subpoena and Mr. Bondy was complying for
7 Mr. Parnas to the subpoena. But I also think that
8 Mr. Blanche's letter raises legitimate concerns. I think it's
9 a principle on which it's based that jointly held privilege
10 cannot legally be waived by one of the holders of privilege,
11 unilaterally. It's certainly correct. But I think it's a
12 difficult situation because there was subpoena.

13 So what I'm going to order for now is that, Mr. Bondy,
14 I'll take you up on your suggestion that you make an effort. I
15 am not going to require that you get a clawback from the House
16 Committee at this time. I'm going to leave open the possible
17 further remedies along those lines. But I think for now I am
18 going to direct you to communicate with the House Committee to
19 take whatever steps including providing them, after conferring
20 with the other parties, any names of attorneys that they should
21 be aware of, making sure that they do not publicly disclose
22 those without further communication with the parties and the
23 Court for now. I am not going to require destruction or return
24 but I think for now the important thing to avoid concerns that
25 have been raised is public disclosure or something that might

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1 be a privilege held by the other defendants

2 MR. BONDY: Yes, your Honor, we'll do that. And just
3 to be clear, the cloud that we now are accessing is outside the
4 scope of protected order and not governed by this discussion.

5 THE COURT: I think that is right and I think
6 Mr. Blanche acknowledges that and I think that if parties,
7 other defendants have a remedy there, it would probably be in
8 Washington. I have no idea whether they do or not but if they
9 do, it'll probably be, that's outside the protective order and
10 therefore outside my purview I think.

11 MR. BONDY: Thank you very much, your Honor.

12 THE COURT: Is there anything else anybody, obviously,
13 we're coming back on Monday afternoon to talk about scheduling
14 a general discovered in the case and the other issues that are
15 pending but anything else you want to talk about today?

16 MR. LEFCOURT: Yes, your Honor. When I spoke to
17 Mr. Kukushkin about waiving his appearance for today and
18 telling him about your order with respect to Monday, he was
19 very concerned about having to travel all across the country
20 for what perhaps is an hour more or less of a conference. He
21 would very much like to waive his appearance and save the
22 expense of doing that. He understands that it very well may be
23 the case that a motion schedule, the trial date will be
24 discussed on Monday and he is fine with that and he would be
25 really pleased with the Court not to make him come all the way

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1 from San Francisco and have that expense to be here for less
2 than an hour probably.

3 THE COURT: Well, my main concern was setting those
4 dates and I think to the extent someone has strong feelings
5 when he suggest dates and talk about dates and what you to be
6 in a position to speak to that on Monday.

7 MR. LEFCOURT: Some of us on the defense side have
8 discussed and we are going to try to arrange what we think is a
9 reasonable schedule, present to the government, see if they
10 agree, but Mr. Kukushkin's presence is not necessary for that.

11 THE COURT: OK. Let me hear from the other clients.

12 MR. BLANCHE: Your Honor, Mr. Fruman might have to
13 come all because of your Honor's order. He would very much
14 rather not come. Everything that was just said to you is true
15 of my client as well, as far as discussions about next steps
16 with respect to motions and timeframe and trial dates and the
17 like. If he were here, I'm not sure as these things go I don't
18 anticipate being, it wouldn't make much of a difference, your
19 Honor. I know his views and thoughts on scheduling and the
20 process and we are going to talk today and tomorrow and so I'll
21 be able to communicate with him the same thing. So certainly,
22 if can he avoid the trip to New York, I would join in the
23 request as well.

24 THE COURT: How about the other two?

25 MS. RAILTON: I think Mr. Correia is planning to

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1 attend. I am not sure if he will come if there's no directive
2 but as of today he is planning to attend.

3 MR. BONDY: We couldn't keep him away, your Honor.

4 THE COURT: How about the government?

5 MR. ZOLKIND: We take no position on whether the
6 defendants should be here.

7 THE COURT: OK. I'm going to take back the
8 requirement given what you've said about assuring me that you
9 will be a position to set the schedule I'd like to set and you
10 will be fully informed about your client's views on those
11 scheduling issues and will get back to your clients about any
12 scheduling issues we talk about, I'll make it optional.

13 MR. BLANCHE: Thank you, your Honor.

14 MR. BONDY: Thank you.

15 MR. LEFCOURT: Thank you.

16 THE COURT: Anything else?

17 MR. ZOLKIND: Not from the government.

18 MR. LEFCOURT: Thank you.

19 THE COURT: All right. Thank you, folks. We'll see
20 you Monday.

21 We are adjourned.

22 MR. LEFCOURT: Your Honor, I have one more thing.

23 THE COURT: Yes.

24 MR. LEFCOURT: I don't know what your Honor is
25 thinking about with respect to my application on the 3504 or

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1 whether you wish to discuss that in any way on Monday or --

2 THE COURT: I'll likely to rule on it on Monday.

3 MR. LEFCOURT: So we don't need to prepare for
4 argument?

5 THE COURT: No. OK. Thank you very much.

6 (Adjourned)